81-4

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PRAMAN CHIRAVACHARDHIKUL
a.k.a. PRAMAN CHIRAVACHARDHIKUL

PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Court erred as a matter of law by affirming the Board of Immigration Appeals interpretation of §212 (c) of the Immigration and Nationality Act to require an alien can only be eligible for §212 (c) relief if he has maintained a domicile in the United States for seven consecutive years <u>after</u> becoming a permanent resident.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Praman Chiravacharadhikul petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

OPINION BELOW

The decision of the Court of Appeals is reported at 645 F. 2d. 248 (1981). The decision is included in the appendix as APPENDIX A.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1981. The petitioner's timely petition for re-hearing en banc, was denied May 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 2350.

QUESTION PRESENTED

Whether the Court erred as a matter of law by affirming the Board of Immigration Appeals interpretation of §212(c) of the

Immigration and Nationality Act to require an alien can only be eligible for §212(c) relief if he has maintained a domicile in the United States for seven consecutive years after becoming a permanent resident.

STATUTE INVOLVED

Section 212(c), 8 U.S.C. 1182(c), provides:

> §1182. Excludable aliens -- General classes
>
> * * *
>
> Nonapplicability of subsection (a) (1) to (25), (30), and (31)
>
> (c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

STATEMENT OF THE CASE

The facts in the case are undisputed. Petitioner originally entered the United States on December 14, 1968, as a student under §101 (a)(15)(F)(i) of the Immigration and Nationality Act (hereinafter referred to as F-1). On March 27, 1970, he received a change of status from student (F-1) to employee of Ambassador as defined in §101(a)(15)(A)(ii) of the Act (hereinafter referred to as A-2).

In 1973 Petitioner applied for permanent residency. He remained in that status until entering San Salvador in February 1977 to await the issuance of his permanent residency. He received his permanent residency on February 28, 1977.

Both Petitioner and his wife obtained their immigrant visas on the basis of their child, who was born to them on June 4, 1971 in Washington, D.C., and whose birth registration exempted them from labor certification requirement.

From the time of his change of status to an A-2 on March 27, 1970, the Petitioner exclusively established his residence and domicile in the United States. He currently resides in Alexandria, Virginia.

On March 21, 1978, the Petitioner was convicted in the United States District Court in the District of Columbia for distribution of a controlled substance, to-wit: cocaine in violation of 21 U.S.C. 841(a). He received a sentence of confinement from one year to five years. The execution of that sentence was suspended and he was placed on probation for a period of three years with the special condition that he contribute 200 hours in a community service program without compensation for two (2) years. Subsequent to his conviction, his adjustment to probation was excellent. Also, his community service requirement at the Homeowner's Task Force of the Alexandria Chamber of Commerce was exemplary and his reputation in his work and home community was beyond reproach.

Furthermore, he co-operated fully with the police and prosecutorial authorities. (Note: affidavits in the record support these facts).

Nevertheless, pursuant to the narcotics conviction, an order to show cause and notice of hearing were filed by the Immigration and Naturalization Service on July 25, 1978. Subsequently, Judge Emil Bobek, on September 11, 1978, found the Petitioner deportable and entered an order of deportation. At the hearing, Judge Bobek determined that the petitioner was statutorily ineligible to be considered for relief under §212(c) of the Act, 8 U.S.C. §1182(c) since under the Board of Immigration Appeal's (the Board) interpretation of that section, petitioner did not have the requisite seven year requirement of lawful domicile.

The Board affirmed and stated that relief under §212(c) was inapplicable because it interprets that statute to

require that the seven year domicile be acquired subsequent to the attainment of permanent resident status. Thus, though petitioner had established a domicile in this country for more than the required seven years, §212(c) consideration was denied him because he had not accumulated the seven year period after the procurement of his permanent residency in 1977.

Petitioner subsequently petitioned the Fourth Circuit Court of Appeals for a review of the Board's decision under 8 U.S.C. §1105(a). In the decision rendered by a three judge panel of that Court, the Board's decision was affirmed. Senior Circuit Judge Bryan wrote the opinion for himself and Circuit Judge Widener. Chief Judge Haynsworth dissented and agreed with petitioner's position, to-wit: that petitioner is eligible to be considered for §212(c) relief since he has been admitted for permanent residency and he has maintained a lawful, unrelinquished

domicile in the country for seven consecutive years.

REASONS FOR GRANTING THE PETITION

1. The decision below directly conflicts with another decision of a Court of Appeals wherein the Boards restrictive interpretation of §212(c) was rejected.

The Court below affirmed the Board's interpretation of §212(c)[1] to require that the seven year domicile be acquired subsequent to the attainment by the alien of permanent residence status. That interpretation has been the subject of four Court of Appeals decisions (including our decision) since it was first challenged in Tim Lok v. I.N.S., 548 F.2d 37 (2nd Cir. 1977). There now exists a direct conflict between the Ninth and Fourth Circuits (both two to one split decisions affirming the Boards interpretation) and the Second Cir-

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[1] Although its language refers to the exclusion of an alien, §212(c) also applies to circumstances of deportation. Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976). This is not an issue in the case.

cuit (a unanimous decision rejecting the Boards restrictive interpretation). It is a prime function of this Court's certiorari jurisdiction to resolve precisely the kind of conflict presented here.

The restrictive interpretation was rejected by the Second Circuit in Tim Lok, supra, wherein Chief Judge Kaufman wrote for a unanimous panel composed of himself, Judge Friendly and Judge Oakes. The Court reviewed the legislative history and concluded that while Congress clearly intended §212(c) relief to apply to aliens who had achieved permanent residence status, nothing in the wording of the Committee reports or in the law indicated that "lawful unrelinquished domicile of seven consecutive years" had to follow the attainment of permanent residence status. The Court indicated that the most that could be said from the language of the reports was that the section applied to aliens that were permanent residents and who had a

lawful domicile in this country of seven consecutive years, regardless of when that occurred. After careful consideration of the statutory language, Judge Kaufman concluded that the phrase, "lawfully admitted for permanent residence" as defined in 8 U.S.C. §1101 (a)(20), refers to aliens accorded the privilege of residing permanently in this country as immigrants, while "lawful unrelinquished domicile" is not defined in the act, and does not have the same meaning. Tim Lok , 548 F.2d at 40. Therefore, the Court held that even though the alien had not been a permanent resident for seven consecutive years, he was nevertheless eligible to be considered for relief under §212(c).

In 1977 the Board reiterated its interpretation and refused to apply the holding of Tim Lok in cases arising outside the Second Circuit. Matter of Anwo Interim Decision 2604 (BIA 1977). Petitioner Anwo sought relief in the

United States Court of Appeals for the District of Columbia. On June 19, 1979, that Court issued an opinion affirming the Board's decision in the facts of that case, but used an approach that supports our position. Anwo v. I.N.S., 607 F.2d 435 (D.C. Cir. 1979). In a per curiam decision the Court declined to "choose between the conflicting interpretation of the Board and the Second Circuit", Anwo, 607 F.2d, at 437. The Court stated that even if they accepted Tim Lok's interpretation of the statutory scheme, petitioner Anwo still would not succeed. Their reasoning is quite sound:

> We need not now choose between the conflicting interpretations of the Board and the Second Circuit, for we are convinced that even under more permissive Tim Lok standard, Anwo has failed to satisfy §212(c)'s requirement of "lawful unrelinquished domicile of seven consecutive years". Although the word "domicile" is nowhere defined in the Immigration and Nationality Act, it is generally accepted that domicile is not established unless an individual intends to reside perman-

> ently or indefinately in the new location. For at least three of the seven years during which the petitioner claims to have been lawfully domiciled in this country, he held a status of a non-immigrant studen. In order to qualify for a student visa, however, the alien must "enter the United States temporarily and solely for the purpose of pursuing such a course of study and must maintain "a residence in a foreign country which he has no intention of abandoning", 8 U.S.C. §1101(a)(15)(F)(i) (1976). Thus, Anwo could not have established a "lawful domicile" in the United States during the period in which he held a student visa. On the one hand, if Anwo complied with the terms of his visa and did not intend to abandon his residence in Liberia, then he was not "domiciled" in this country; on the other hand, if Anwo did intend to make the United States his permanent home and domicile, then he violated the conditions of his student visa and was not here "lawfully". Under either hypothesis, Anwo cannot satisfy the eligibility requirements of §212(c), Anwo, 607 F.2d at 437.

Important to our argument is that the Court based its decision on the recent Supreme Court decision of Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed 2d 614 (1978). In footnote eight of the Anwo

decision, related here in its entirety, the Court stated:

> Our conclusion that the petitioner cannot be lawfully domiciled in this country while holding a student visa is buttressed by the Supreme Court's recent decision in Elkins v. Moreno, 435 U.S. 647 98 S.Ct. 1338 55 L.Ed 2d 614 (1978). In that case, the Court considered whether non-immigrant aliens admitted under 8 U.S.C. §1101 (a) (15) (G) (iv) (employees of international organizations and their dependants) could acquire Maryland domicile for "in-state" tuition purposes. Although Elkins did not involve an interpretation of the language of §212(c), the Court indicated that under the immigration laws, a non-immigrant student could not lawfully maintain a domicile in this country...Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States. Thus...a non-immigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning...and who seeks to enter the United States temporarily and solely for the purpose of pursuing...a course of study...", §101 (a) (15) (F)...
>
> By including restrictions on intent in the definition of some non-immigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States

> was to immigrate permanently. Moreover, since a non-immigrant alien who does not maintain the conditions attached to his status can be deported, see §241(a)(9) of the 1952 Act, 66 Stat. 206 as amended, 8 U.S.C. §1251(a)(9)(1976 ed.), it is also clear that Congress intended that, in the absence of an adjustment of status...non-immigrants in restricted classes who sought to establish domicile would be deported, 98 S.Ct at 1349; Anwo, 607 F. 2d at 437 N8.

A month after Anwo was decided, in Castillo-Felix v. I.N.S., 601 F.2d 459 (9th Cir., 1979), the Court of Appeals for the Ninth Circuit had an opportunity to choose between the Board and Tim Lok's interpretation of §212(c) in a non-drug matter. The petitioner, an alien, entered this country illegally in 1963. In November 1969, he was apprehended by the Immigration Service and given leave to depart voluntarily, but re-entered illegally the next day. In October of 1970 he married a permanent resident, and, after a grant of extended voluntary departure, on April 7, 1972, he was lawfully admitted for permanent residence with a visa. In

August of 1975, he was convicted of knowingly inducing entry of two undocumented aliens in violation of §274(a)(4) of the I.N.A. He subsequently conceded deportability and applied for §212(c) relief. In June 1977, the Immigration Judge found the petitioner ineligible because he had not been continuously domiciled in the United States for seven years after his admission for permanent residence. The Board affirmed.

In the Court of Appeals, the petitioner relied on the Tim Lok interpretation of the statute. The Court of Appeals in a split decision stated their belief that the language of §212(c) is ambiguous and could support either in the I.N.S. view or that of Tim Lok. However, the Court parted company with the Second Circuit's conclusion in Tim Lok and agreed with the Board that to be eligible for §212(c) relief the alien must accumulate seven years of lawful unrelinquished

domicile after their admission for permanent residence.

Unlike the petitioner in Anwo, a non-immigrant student as defined by §101 (a) (15) (F) (i), or the petitioner in Castillo-Felix, petitioner, Praman, received a change of status in 1970 from F-1 (student) to A-2 (employee of ambassador). This A-2 status remained intact until he entered El Salvador in 1977 to await the issuance of his immigration visa. Thus, as Chief Judge Haynsworth aptly states, unlike the situations that preceded this case "there is no ambiguity in the application of the statute to him".

Therefore, the threshold question in our petition is as follows: Can Petitioner, Praman, who had accumulated seven years from the commencement of his A-2 status establish a "lawful unrelinquished domicile" of seven consecutive years in the United States so as to be eligible for §212 (c) relief? If Petitioner, Praman,

lived in the Second Circuit, Tim Lok would dictate that this be answered in the affirmative. If Judge Haynsworth's reasoning, as stated in this dissent in our case, or Judge Takasugi's reasoning, as stated in his dissent in Castillo-Felix applied, the answer would likewise be in the affirmative.

Since the 1977 Tim Lok challenge there has already been a direct conflict in the Circuits. Because the issue will likely be litigated in various courts for years to come, the matter must be decided by this Court. The importance of and recurring nature of this issue cannot be overemphasized. Any permanent resident alien, whether subject to exclusion or deportation, who has been domiciled in this country for seven consecutive years, but who has not been a permanent resident for the seven years, is affected by this precise issue. Significantly, the scholarly literature published on this issue also

recognizes the importance of this issue, and, in fact, supports our interpretation of §212(c). Hall, Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act, 47 Univ. of Chi. Law Rev. 771 (1980); Griffith, Relief From Exclusion and Deportation, 15 San Diego Law Rev. 93, 96 (1977); Kramer, Waivers Related to Grounds of Exclusion, 56 Interpreter Releases 527, 529 (1979).

2. The decision below completely ignores the recent opinion of this Court in Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed. 2d 614 (1978).

The Court of Appeals for the District of Columbia in Anwo, supra, properly recognized the significance of this Court's decision in Elkins v. Moreno, to our precise issue. Our Fourth Circuit decision completely ignored the important ramifications of that decision. In Elkins v. Moreno, supra, the Court ruled that aliens classified under §101(a)(15)(G)(iv) of the Act (hereinafter referred to as G-4) are

not precluded by Federal law from acquiring a domicile in the United States. 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed. 2d 614 (1978). This ruling is highly significant to our case.

Under current law, generally aliens are admitted to the United States as either immigrants (aliens lawfully admitted for permanent residence) or non-immigrants within the terms of §101 (a)(15) of the Act. The section specifically restricts some of those sub-categories from intending to make this country their home.

In writing the Court's opinion, Justice Brennan discussed this statutory framework and its relationship to whether or not a certain class within the statutory framework can "lawfully" establish a "domicile" in this country. Justice Brennan stated:

> "Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication on an intent not to seek domicile in the United

> States...Similarly, a non-immigrant studentis defined as "an alien having a residence in a foreign country which he has no intention of abandoning...and who seeks to enter the United States temporarily and solely for the purpose of pursuing...a course of study."
>
> "But Congress did not restrict every non-immigrant class. In particular, no restrictions on a non-immigrant intent were placed on aliens admitted under §101 (a)(15)(G)(iv)... The conclusion is therefore inescapable that, where as with the G-4 class, Congress, did not impose restrictions on the intent, this was deliberate. Congress' silence is therefore pregnant, and we read it to mean that Congress, while anticipating that permanent immigration should occur through immigrant channels, was willing to allow non-restricted non-immigrant aliens to adopt the United States as their domicile. Elkins v. Moreno, 98 S.Ct. at 1349.

Thus, this Court hasnow made it clear that at least certain non-immigrants can establish a "lawful domicile". By analogy, after restudying the statutory requirements for A-2 non-immigrants, as listed in §101 (a)(15)(A)(ii), it is

clear that one in that status can also establish a "lawful domicile" in the United States. Like his G-4 counterpart, an A-2 non-immigrant is not restricted by having to possess an intent not to abandon a foreign residence, or, by implication, an intent not to seek domicile in the United States. Elkins v. Moreno, 98 S.Ct. at 1349.

In its brief before the Court of Appeals, the respondent states that the Board's position regarding §212(c) is that "a lawful domicile can only be established by an alien lawfully admitted for permanent residence" (see p.22 of Respondent's Brief to the Court of Appeals). That reasoning is erroneous. The Board's misplaced logic is clearly stated in Matter of Anwo, the decision rejecting Tim Lok's interpretation of §212(c) for cases arising outside the Second Circuit. The Board stated that all non-immigrants are "expected to enter,

accomplish the purpose of his visit and to leave within a relatively short period of time." Matter of Anwo, supra, at 5-6. Clearly, Elkins completely repudiates this reasoning. The Fourth Circuit, despite the fact that Elkins was discussed at length by both sides, simply ignores the issue in its entirety. That oversight can only be corrected by this Court.

3. The decision below has used a standard of statutory construction that is in direct conflict with many applicable decisions of this Court.

Even though we contend that the statute on its face clearly supports our position, and Judge Haynsworth in his dissent confirms this view, the majority opinion below agrees with the Ninth Circuit that the statute is "ambiguous". Assuming that the majority is correct in its assumption that the provision is "ambiguous" (see p. 8a of the appendix), the Court adopted an incorrect standard

of statutory construction for this deportation statute. Great reliance is placed on an "admonition" contained in Udall v. Tallman, et al., 380 U.S.1, 16 (1964). However, Udall's "admonition" relates to the Secretary of Interior's construction of two executive orders regarding oil and gas leasing arrangements under the Mineral Leasing Act. That decision has nothing to do with deportation and does not even relate to the interpretation of an act of Congress.

Reliance upon Udall's "admonition" while interpreting a deportation statute establishes a rule of statutory construction that is completely contrary to principles established by the Supreme Court. Since deportation is the severest of sanctions, it is settled doctrine that deportation statutes, if ambiguous, must be construed in favor of the alien.

In 1964, the very year that Udall was decided, the Supreme Court rendered the

decision of Costello v. I.N.S., 84 S.Ct. 580, 376 U.S. 120 (1964). Costello concerned the interpretation of §241(a) of the Act. Justice Stewart, writing for the Court, stated:

> "If, however, despite the impact of §241(b)(2), it should still be thought that the language of §241(a)(4) itself and the absence of leave the matter in some doubt, we would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner. As the Court has emphasized, 'deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U.S. 388, 68 S.Ct. 10 [92 L.Ed.17]. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his feedom beyond that which is required by the narrowest of several possible meanings of the words used.' Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433." 84 S.Ct. at 585.

These principles have been stated and adhered to many times. Barber v. Gonzales, 347 U.S. 637, 642-3, 74 S.Ct. 822, 825, 98 L.Ed. 1009 (1954). (The Court in an opinion by Chief Justice Warren, the author of the Udall opinion, interpreted an ambiguous deportation statute in favor of the alien); Bonetti v. Rogers, 356 U.S. 691, 699, 78 S.Ct. 976, 980-1, 2 L.Ed. 2d 1087 (1958). (The Court interpreted an ambiguous deportation statute in favor of the alien relying upon the statutory construction rules referred to in Fong Haw Tan, supra, Delgadillo, supra, and Barber, supra; Rosenberg v. Fleuti, 374 U.S. 424, 457, 83 S.Ct. 1804, 1810, 10 L.Ed. 2 1000 (1963); I.N.S. v. Errico, 380 U.S. 214, 225, 87 S.Ct. 473, 480, 17 L.Ed. 2d 318 (1966) (Chief Justice Warren, two years after his Udall opinion admonishes that, "Even if there were some doubt as to the correct construction of the statute the doubt should be resolved

in favor of the alien".) Lennon v. I.N.S., 527 F.2d 187, 193 (2nd Cir. 1975); Marino v. I.N.S., 537 F.2d 686, 691 (2nd Cir. 1977); Castenada v. I.N.S., 585 F.2d. 1309, 1315 (5th Cir. 1978).

The respondent concedes that there is nothing in the legislative history which states clearly that the Board's interpretation of Section 212(c) is correct (see p.19, nt.12 of Respondent's brief to the Court of Appeals). Indeed, the majority states its opinion that the statute is ambiguous, (see p.8a of the appendix). As such, the Court is obligated to adopt the statutory construction rules as advanced by this Court consistantly time and time again. It is the duty of this Court to correct the error and clarify this issue. Otherwise, the lower courts will be at a loss as to precisely what rule is applicable.

CONCLUSION

For these reasons a writ of certiorari

should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

Praman CHIRAVACHARADHIKUL a.k.a.
Praman Chiravacharadhijul,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 80-1479

United States Court of Appeals
Fourth Circuit

Argued Feb. 2, 1981

Decided April 3, 1981

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WIDENER, Circuit Judge.

ALBERT V. BRYAN, Senior Circuit Judge:

Praman Chiravacharadhikul seeks review of the Board of Immigration Appeals' (BIA) order denying him eligibility for the discretionary relief from deportation permitted under §212(c) of the Immigration and Nationality Act (the Act),

8 U.S.C. §1182(c).[1] To qualify for such relief, an alien must have acquired a lawful unrelinquished domicile of seven consecutive years." Although Praman had lived continuously in this country for more than the required seven years, the Immigration and Naturalization Service (INS) denied him invocation of the provisions of §212(c) because he had not accumulated the seven-year statutory period of stay after the procurement of

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1. 8 U.S.C. §1182(c):

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad volunatily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section.

This statute is a codification of §212(c) of the Act. Although its language refers to the exclusion of an alien, §212(c) also applies to circumstances of deportation. Castillo-Felix v. INS, 601 F.2d 459 (9th Cir. 1979); Francis v. INS, 532 F.2d 268 (2d. Cir. 1976).

his permanent resident status in 1977. He petitioned this court for review of the decision in July 1980. 8 U.S.C. §1105a. We affirm and accordingly deny petitioner's claim for exoneration from deportation.

Praman, a native of Thailand, came to the United States on December 4, 1968 under a student visa (an F-1). 8 U.S.C. §1101(a)(15)(F)(i). On March 27, 1970 he obtained a job as a chauffeur for the Ambassador of Thailand and he received a change of status under the Act from student to non-immigrant employee for a foreign government (an A-2). 8 U.S.C. §1101(a)(15)(A)(ii). He was married and the couple had a child born in Washington, D.C. on June 4, 1971, but he was separated from his wife at the time of the initial hearing on his petition. Praman applied for permanent residency in 1973. Upon returning from a visit to Thailand in 1975, he entered the country

as a non-immigrant employee. Subsequently, Praman traveled to San Salvador and there obtained a non-preference visa. Upon re-entry to the United States on February 28, 1977 he was admitted as a premanent resident.

On March 21, 1978 in the United States District Court for the District of Columbia, Praman was convicted of the unlawful distribution of a controlled substance and received a suspended sentence of confinement of one to five years. 21 U.S.C. §841(a).

As a result, on July 25, 1978 the District Director of the INS issued an order requiring Praman to appear before one of the judges and show cause why he should not be deported by reason of the criminal conviction. 8 U.S.C. §1251(a)(2).[2] After a full hearing with

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2. 8 U.S.C. §1251(a)(2):

Any alien in the United States (in-

[Ftnt. cont'd. next pg.]

counsel before the Immigration Judge on the shown cause order, Praman was, on September 12, 1978, ordered deported and September 12, 1978 a judgment was entered to that effect. In this proceeding Praman was also found to be "statutorily ineligible" to receive discretionary relief from deportation under §212(c), the judge basing his determination "upon rulings of the Board of Immigration Appeals."[3]

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cluding an alien crewman) shall, upon the order of the Attorney General, be deported who--

* * * * * *

entered the United States without inspection or at any time or place other than as designated by the Attorney general or is in the United States in violation of this chapter or in violation of any other law of the United States. (Accent added.)

Before the Immigration Judge, Praman conceded that deportability was established by his conviction.

3. In its opinion the BIA notes: "In urging reversal of the immigration

[Ftnt. cont'd. next pg.]

On February 1, 1980 the Board of Immigration Appeals dismissed Praman's appeal from the decision of the Immigration Judge, it having concluded that:

> Deportability has been established by clear, convincing and unequivocal evidence.
>
> * * * * * *
>
> The record establishes and we find that the respondent does not have the requisite period of continuous lawful un-relinquished domicile in the United States. See Matter of Newton, Interim Decision 2733 (BIA 1979) and cases cited therein. In any event, section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Even if the respondent were eligible, we would not grant him section 212(c) relief in view of his involvement in distributing cocaine. Accordingly, the appeal will be dismissed.

The Immigration Judge had earlier noted that the keystone for decision in this case was the prior "rulings of the Board of Immigration Appeals." Infra at

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judge's denial of a waiver of deportability, counsel stated, and correctly so, 'We, of course, concede that section 212(c) relief is discretionary.'"

249. His thesis was reaffirmed by the BIA: it looked to the history of its own conclusions, citing in Matter of Newton, Interim Decision 2733 (BIA 1979).[4]

The BIA originally construed §212(c) in Matter of S, 5 I & N Dec. 116 (1953). There it disallowed eligibility to an alien who had resided in the United States for more than seven consecutive years, but had spent only four of them as a permanent resident:

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4. Newton confirmed the BIA's original statutory construction:

> We decline to reconsider our decision in Matter of Anwo in which we set forth our rationale for refusing to recede from a statutory interpretation that has been consistently applied by the Board for some 26 years.
>
> * * * * * *
>
> We find that the original of the language now in section 212(c), along with the clear legislative intent in 1952 to restrict the scope of the seventh proviso, support the conclusion that such relief was intended to be available only to aliens acquiring seven years of domicile after their entry for permanent residence.

> In view of the plain language of section 212(c) of the Immigration and Nationality Act ... together with the review of the historical background of the legislation, we come to the conclusion that this provision of law is available only to those lawfully resident aliens who are returning to an unrelinquished domicile of 7 consecutive years subsequent to a lawful entry. In other words, we construe the section to mean that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence; and that not only the admission must be lawful but that the period of residence must be lawful.

Id. at 118 (accent added).

The soundness of this ratio decidendi was confirmed by the Ninth Circuit in an almost identical factual milieu in Castillo-Felix v. INS, 601 F.2d 459 (1979). Its determination was that reached by the BIA in the review now before us. While recognizing the issue as difficult of resolution, the Court nevertheless decided it with its own reasoning and citation:

> We are left with an ambiguous pro-

vision with little legislative history to clarify how Congress intended it to be applied. The INS, the agency charged with interpreting the immigration laws, first interpreted §1182(c) in 1952 and has adhered to its position for 26 years. We stated in Baur v. Mathews, 578 F.2d 228, 233 (9th Cir. 1978):

> The administrative agency clothed with responsibility for implementing congressional pronouncements is generally well acquainted with the policy of the statute it administers. This is particularly true when the agency has long been involved in the construction and administration of a given statute or its predecessors. Where, as here, the agency has extensive experience, has relied on the common meaning of the relevant statute's specific language, and can point to important congressional purposes furthered by its interpretation, only a clear showing of a contrary intent by Congress will justify overruling the agency's regulations.

See also DHL Corp. v. C.A.B., 584 F.2d 914, 919-20 (9th Cir. 1978); Nazareno v. Attorney General of the United States, 168 U.S.App.D.C. 22, 26, 512 F.2d 936, 940 (1975).

601 F.2d at 465 (accend added) (footnotes omitted).

Castillo-Felix acknowledges the force of the contrary view of Lok v. INS,

548 F.2d 37 (2d Cir. 1977) but rejects its adoption as precedent for the interpretation of §212(c). We agree with the Ninth Circuit for it is incredible to hold that Congress would let stand the unvarying and constant reading of its enactment by the INS for over 26 years if that reading disregarded the Congressional intent. Especially is this convincing of the correctness of the Service's stand when Congress placed the Act in the care of the INS, and continues it, as the body endowed with the expertise and experience indispensable to a fair, reasonable and exacting enforcement of the legislation, so long as the Constitutional rights of persons are not impaired.[5]

We follow the admonition so plainly written in Udall, Secretary of the Interior v. Tallman, et al., 380 U.S. 1,

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5. There are no Constitutional privileges at stake in this litigation

16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1964) that:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Comm'n v. Aragon, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136. See also, e.g., Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326 86 L.Ed. 301; Universal Battery Co. v. United States, 281 U.S. 580, 583, 50 S.Ct. 422, 423, 74 L.Ed. 1051.

Here as the BIA's interpretation of the statutory section is neither inconsistent nor unjustified, we uphold the Board's construction which, in its estimation, will better serve the legislative intent and purpose.

Affirmed.

HAYNSWORTH, Chief Judge, dissenting:

I respectfully dissent.

The statute[1] provides for eligibility for the exercise by the Attorney General of his discretion if the returning alien (1) is "admitted for permanent resident," and (2) is "returning to a lawful unrelinquished domicile of seven consecutive years." The statute is now consistently applied to deportation cases so that the requisites for eligibility are that an alien shall have been admitted for permanent residence and that he have a lawful unrelinquished domicile of seven consecutive years. This petitioner clearly meets both branches of the test.

If his presence in this country had been unlawful at any time, we might be confronted with a question whether, during that time, he could have a lawful domicile. There might be some question of whether he could acquire domiciliary status at all if he was here on some

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1. 8 U.S.C.A. §1182(c)

temporary permit, as that issued to students. In 1970, however, he had been classified as a non-immigrant employee of a foreign government. As such, he could lawfully remain indefinitely. See Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 614. There was no impediment to his establishment of an entirely lawful domicile, which he did. It had been maintained for more than seven years, though his change in status from that of an employee of a foreign embassy to an immigrant for permanent residence occurred less than seven years ago. There is no ambiguity in the application of the statute to him. Hence, in this case we are not met with the possibly troublesome problems which confronted the Second and Ninth Circuits in Lok v. INS, 548 F.2d (2d Cir. 1977), and Castillo-Felix v. INS, 601 F.2d 459 (9th Cir. 1979).

Even if we were met with those problems, I would come out as the Second Cir-

cuit did. I think Judge Kaufman, writing for a panel composed of himself, Judge Friendly and Judge Oakes, presuasively demonstrated that there is no ambiguity in the statute occasioning extreme deference to administrative interpretation. Moreover, there are no practical problems or policy considerations supporting the administrative interpretation, as the dissenting opinion of Judge Takasugi in Castillo-Felix demonstrates.

The Congress in 1950 considered language which would require the result reached by the majority, but the Congress did not adopt that language. The language it did adopt in 1952 seems to me inconsistent with the subsequent administrative interpretation. I am left with the feeling that the administrative interpretation was born of the administrator's preconceived notion of what should be, rather than of an attempt fairly to construe Congressional purpose and intent.

The question before us is not whether the petitioner should be deported. The statute, as I interpret it, simply means that his case should be submitted to the Attorney General of the United States who, after considering all factors, would be free to exercise his discretion as to whether or not the petitioner should be deported.

Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PRAMAN CHIRAVACHRDHIKUL
a.k.a. PRAMAN CHIRAVACHARDHIKUL

PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE

RESPONDENT

SUPPLEMENTAL APPENDIX

PETITION FOR WRIT
OF CERTIORARI TO
THE UNITED STATES
COURT OF APPEALS
FOR THE FOURTH
CIRCUIT

Frank J. Ceresi
Attorney for Petitioner
2060 North 14th Street
Arlington, Virginia 22201
703-524-1900

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A35 527 287 - Washington, D.C.-

In the Matter of)
)
Praman CHIRAVACHARADHUKUL) IN DEPORTATION
)PROCEEDINGS
Respondent)

CHARGE: I&N Act - Section 241 (a) (11) Convicted of a violation of law relating to the illicit traffic on a narcotic drug controlled substance, to wit: cocaine, in violation of Title 21 United States Code Section 841(a).

APPLICATION: Section 212 (c) and in the alternative voluntary departure.

IN BEHALF OF RESPONDENT

Frank J. Ceresi
2060 North 14th St #209
Arlington, Va. 22201

IN BEHALF OF SERVICE

Ernest Hupp, Esq.
Trial Attorney
Washington, D.C.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 28 year-old married male alien, native and citizen of Thailand. Through counsel he admits as the Order to Show Cause alleges, that

he entered the United States at Washington, D.C. on or about February 28, 1977 at which time he was admitted as an immigrant. He also admits through counsel that on March 21, 1978, he was convicted in the United States District Court for the District of Columbia, Washington, D.C. for distribution of cocaine as schedule 11 narcotic drug controlled substance in violation of Title 21 United States Code Section 841 (a). Deportability under Section 241 (a)(11) of the Immigration and Nationality Act is also conceded in that at any time he had been convicted of a violation of any law or regulation relating to illicit traffic in a Schedule 11 narcotic drug controlled substance, to wit: cocaine, in violation of Title 21 United States Code Section 841 (a).

Government has submitted Exhibit 2 in these proceedings which is the Immigrant visa with which the respondent was admitted to the United States, Exhibit 3, which is a certified copy of the record

of the conviction. Based upon this I do find that the respondent is deportable as charged. Since the respondent has been convicted of a crime involving moral turpitude I find that he is ineligible for the relief of voluntary departure under Section 244 (e) of the Immigration and Nationality Act. Additionally, I find that he is not eligible for the privilege of Section 212 (c) of the Immigration and Nationality Act. Counsel raised the issue and I have determined that the respondent is statutorily ineligible for such relief based upon the rulings of the Board of Immigration Appeals, and such application has not been accepted.

The respondent has designated Thailand as the country of deportation. ORDER: IT IS ORDERED that the respondent be deported from the United States to Thailand on the charges contained in the Order to Show Cause.

/s/
Emil Bobek
IMMIGRATION JUDGE

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

WASHINGTON, D.C. 20503

File: A35 527 287 - Washington, D.C.

In re: PRAMAN CHIRAVACHARDHIKUL

APPEAL

ON BEHALF OF RESPONDENT:

Frank J. Ceresi
2060 North 14th Street #208
Arlington, Virginia 22201

ON BEHALF OF SERVICE:

Donald Convillon, Esquire
Trial Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act (8 U.S.C. 1251(a)(11)- Convicted of a violation of law relating to the illicit traffic in a narcotic drug controlled substance, to wit: cocaine

APPLICATION: Waiver of deportability under section 212(c) of the Immigration and Nationality Act

This case presents an appeal from a

immigration judge 1/ finding the respondent deportable and denying his application for relief under section 212(c) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(c). The immigration judge ordered that the respondent be deported to Thailand. The appeal will be dismissed.

The respondent is a native and citizen of Thailand, age 29, who last entered the United States at Washington, D.C., as an immigrant on or about February 28, 1977. He is married but was separated from his wife at the time of the hearing. The respondent was convicted in the United States District Court for the District of Columbia in March 1978, for distribution of cocaine, a schedule II narcotic drug controlled substance, in violation

1/ The decision of the immigration judge is dated April 4, 1979, which obviously is in error since the appeal was taken on September 19, 1978, following the hearing conducted on September 13, 1978.

of Title 21, United States Code, Section 841(a). The respondent's one to five year sentence was suspended and he was placed on probation for a period of three years (Ex. 3). Deportability has been established by clear, convincing and unequivocal evidence.

The immigration judge found that the respondent is statutorily ineligible for relief under section 212(c) of the Act, "based upon the rulings of the Board." In urging reversal of the immigration judge's denial of a waiver of deportability, counsel stated, and correctly so, "We, of course, concede that section 212(c) relief is descretionary" (Br. p. 13).

We agree with the immigration judge's denial of section 212(c) relief. In Matter of Silva, Interim Decision 2532 (BIA 1976), we held that a subject of deportation proceedings may apply for a waiver of deportation under section

212(c) of the Act which provides , in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraphs (30) and (31) of subsection (a)....

Although the statute describes a waiver available to an alien seeking to enter the United States, we have held that section 212(c) relief may be granted in deportation proceedings to a nondeparting permanent resident alien with seven consecutive years of lawful unrelinquished domicile. See Matter of Silva, supra; see also Francis v. INS, 532 F.2d 268 (2 Cir. 1976).

The record establishes and we find that the respondent does not have the requisite period of continuous lawful

unrelinquished domicile in the United States. See Matter of Newton, Interim Decision 2733 (BIA 1979) and cases cited therein. In any event, section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Even if the respondent were eligible, we would not grant him section 212(c) relief in view of his involvement in distributing cocaine. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Chairman

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80.-1479

Praman Chiravachardhikul
a.k.a. Praman Chiravacharadhijul,

Petitioner,

versus

Immigrational and Naturalization Service,

Respondent.

O R D E R

Upon consideration of the Petitioner's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Bryan for a panel consisting of Judge

Haynsworth, Judge Bryan, and Judge Widener.

For the Court,

/s/ William K. Slate, II
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1479

Praman Chiravacharadhikul
a.k.a. Praman Chiravacharadhijul,

Petitioner,

versus

Immigration and Naturalization Service,

Respondent.

Appeal from the United States Department of Justice, Board of Immigration Appeals.

Upon consideration of a motion of the petitioner, by counsel, for stay of mandate pending application to the Supreme Court of the United States for a writ certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court - by

Direction.

/s/ William K. Slate, II
CLERK

Office - Supreme Court, U.S.
FILED
SEP 17 1981
ALEXANDER L. STEVAS
CLERK

No. 81-4

In the Supreme Court of the United States

OCTOBER TERM, 1980

PRAMAN CHIRAVACHARADHIKUL, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), is available to an alien who can establish the required period of seven years' "lawful unrelinquished domicile" only by including a period of residence in the United States prior to his admission as a permanent resident.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-4

PRAMAN CHIRAVACHARADHIKUL, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 645 F.2d 248. The opinion of the Board of Immigration Appeals (Pet. Supp. App. 5a-9a) and the oral decision of the immigration judge (Pet. Supp. App. 1a-4a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1981. A petition for rehearing was denied on May 1, 1981 (Pet. Supp. App. 10a-11a). The petition for a writ of certiorari was filed on July 2,

1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section.

STATEMENT

1. Petitioner is a native and citizen of Thailand. He entered the United States on December 4, 1968, as a nonimmigrant student under Section 101(a)(15)(F)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. 1101(a)(15)(F)(i).[1] On March 27, 1970, after petitioner assumed employment as a chauffeur for the Ambassador of Thailand to the United States, petitioner's status was altered to that of an employee of a foreign government admitted as a nonimmigrant under Section 101(a)(15)(A)(ii) of the Act, 8 U.S.C. 1101(a)(15)(A)(ii). On July 19, 1971, petitioner married a foreign national, after

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[1] Under the Immigration and Nationality Act there are only two categories of aliens entering the United States. Every alien who enters the country is deemed an "immigrant," unless he can establish that he is a "nonimmigrant." 8 U.S.C. 1101(a)(15), 1184(b); see *Elkins* v. *Moreno*, 435 U.S. 647, 664 (1978).

5a).[3] Petitioner conceded deportability at the subsequent deportation hearing (J.A. 41-42),[4] and the immigration judge ordered him deported to Thailand. The immigration judge also rejected petitioner's application for discretionary relief from deportation under section 212(c) of the Act, 8 U.S.C. 1182(c) (Pet. Supp. App. 3a).[5]

The Board of Immigration Appeals dismissed petitioner's appeal from the decision of the immigration judge (Pet. Supp. App. 5a-9a), holding that petitioner was statutorily ineligible for waiver of deportability relief under Section 212(c) because he "does not have the requisite period of continuous lawful unrelinquished domicile in the United States" (Pet. Supp. App. 8a-9a). The Board also held that if petitioner were eligible for discretionary relief under Section 212(c), it would be denied in view of his conceded involvement in the distribution of cocaine (*id.* at 9a).

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[3] The court of appeals erroneously stated (Pet. App. 4a & n.2) that the provision authorizing deportation cited by the INS was 8 U.S.C. 1251(a)(2). This error has no bearing on the question presented by the petition.

[4] "J.A." refers to the Joint Appendix filed in the court of appeals.

[5] Although Section 212(c) on its face applies only to exclusion proceedings initiated upon return from abroad, it has been extended progressively, through a series of administrative and judicial decisions, to deportation proceedings, even when no travel abroad subsequent to the act establishing deportability has taken place. See *In re Silva*, 16 I. & N. Dec. 26, 30 (1976); *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976); *In re Smith*, 11 I. & N. Dec. 325 (1965); *In re G. A.*, 7 I. & N. Dec. 274 (1956); see also *In re* L., 1 I. & N. Dec. 1 (1940); cf. *In re A.*, 2 I. & N. Dec. 459 (1946); but cf. *Castillo-Felix* v. *INS*, 601 F.2d 459, 462 n.6 (9th Cir. 1979). The INS and BIA have acquiesced in this interpretation of Section 212(c), see *In re Silva*, *supra*, and it is not at issue in this case.

3. A divided panel of the court of appeals affirmed (Pet. App. 1a-15a). The court noted that, ever since its initial decision on the subject in 1953, *In re S.*, 5 I. & N. Dec. 116, the Board of Immigration Appeals had interpreted Section 212(c) of the Act to require that an alien demonstrate a lawful domicile in this country maintained for seven years *subsequent* to his lawful admission for permanent residence (Pet. App. 7a-8a). Concluding that the BIA's interpretation was "neither inconsistent [with the statute] nor unjustified" (*id.* at 11a), the court deferred to the agency's interpretation "which, in its estimation, will better serve the legislative intent and purpose" (*ibid.*). The court thus followed the decision of the Ninth Circuit in *Castillo-Felix* v. *INS*, 601 F.2d 459 (1979), and rejected the decision of the Second Circuit in *Lok* v. *INS*, 548 F.2d 37 (1977), remarking that "[w]e agree with the Ninth Circuit for it is incredible to hold that Congress would let stand the unvarying and constant reading of its enactment by the INS for over 26 years if that reading disregarded the Congressional intent" (Pet. App. 10a).

ARGUMENT

Petitioner's primary contention (Pet. 7-17) is that the decision below conflicts with the decision in *Lok* v. *INS*, 548 F.2d 37 (2d Cir. 1977). We recognize the conflict between the reasoning of the Second Circuit in *Lok* and that of the Ninth Circuit in *Castillo-Felix* v. *INS*, 601 F.2d 459 (1979), which was adopted by the court below. However, it is doubtful that the question presented is sufficiently important or arises sufficiently frequently to warrant review by this Court. Moreover, the Board of Immigration Appeals' alternative determination that petitioner does not

merit discretionary relief under Section 212(c), even if he were eligible, provides a sound independent basis for the result below. This is accordingly an inappropriate case in which to consider the question presented by the petition. Finally, the INS' construction of Section 212(c) is a reasonable, consistent, and long-standing interpretation, adopted by the agency charged with the responsibility for enforcement of the statute. It therefore deserves the deference accorded it by the court of appeals.

1a. In *Lok* v. *INS*, *supra*, 548 F.2d at 39-41, the Second Circuit held that the BIA's interpretation of Section 212(c), limiting relief to individuals who could show seven years of lawful domicile after the date of admission as a permanent resident, was unsupported by the language or legislative history of that provision.[6] When this question next arose, in

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[6] Lok arrived as an alien seaman in 1959, but remained in the United States beyond the permitted interval and escaped detection until 1965. He was ordered deported in that year, but deportation was stayed for various reasons until Lok married an American citizen, who petitioned to classify him as her "immediate relative," eligible for immigration purposes. Lok voluntarily departed the United States in October 1971 and was admitted as a permanent resident in December 1971. One year later, Lok pleaded guilty to commission of a drug-related offense, which led to deportation proceedings under 8 U.S.C. 1251(a)(11). The immigration judge and the BIA denied relief under Section 212(c), on the ground that Lok lacked seven years of domicile following lawful admission for permanent residence. See 548 F.2d at 38-39. Rejecting the BIA's interpretation of Section 212(c), the court of appeals remanded to the Board for a determination whether Lok had maintained a lawful domicile for seven years—*i.e.*, whether his United States' domicile prior to admission as a permanent resident was lawful. 548 F.2d at 41. On remand Lok's domicile prior to his admission as a permanent resident

In re Anwo, 16 I. & N. Dec. 293 (1977), the BIA adhered to its narrower interpretation of Section 212(c), declining to follow the Second Circuit's *Lok* decision. In the alternative, the BIA held that Anwo could not qualify for relief, because he could not have lawfully harbored a domiciliary intent for three of the seven years of residence on which he relied.[7] The District of Columbia Circuit affirmed the BIA's decision, *Anwo* v. *INS*, 607 F.2d 435 (1979), without reaching the question addressed in *Lok*. The court endorsed the BIA's alternative holding, relying (*id.* at 437-438 & n.8) on this Court's statement in *Elkins* v. *Moreno*, 435 U.S. 647, 665-666 (1978), that holders of nonimmigrant student visas such as Anwo (see note 7, *supra*) were prohibited from having a domiciliary intent.

The Ninth Circuit next considered the question presented here, in *Castillo-Felix* v. *INS*, 601 F.2d 459 (1979).[8] Expressly rejecting the Second Circuit's

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was determined to be unlawful. *In re Lok*, I.D. No. 2878 (B.I.A. July 31, 1981), slip op. 12-15.

[7] Anwo was admitted as a nonimmigrant student in 1969. Such an alien must intend to remain a resident of his foreign country. 8 U.S.C. 1101(a)(15)(F)(i). Anwo was accorded permanent resident status in 1973 after he had married a resident alien in 1971. He was convicted of possession of illegal drugs in 1975.

[8] Castillo-Felix entered the United States illegally in 1963, but escaped detection until 1969 when he was apprehended and allowed to depart voluntarily in lieu of deportation. He returned to the United States, again illegally, one day after his departure. Castillo-Felix was again apprehended, in 1970, but succeeded in deferring his departure until he received a permanent resident visa and was admitted as an immigrant in 1972. Three years later he was convicted of introducing illegal aliens into the United States, and deportation proceed-

conclusion in *Lok* (*id.* at 463-464), the Ninth Circuit concluded that the statutory language and legislative history of Section 212(c) were ambiguous. 601 F.2d at 464-465. The court noted that even after *Elkins* v. *Moreno*, *supra*, most classes of nonimmigrants are barred from lawfully harboring domiciliary intent, and that, accordingly, relatively few cases would turn on the question. *Id.* at 464. The court thought it unlikely that Congress intended to include those few individuals who spent part of the required seven years in one of the small classes of nonimmigrants who are eligible to become domiciliaries, along with those who were permanent resident immigrants throughout, in the group eligible for relief under Section 212(c). *Id.* at 465. The court accordingly deferred to the BIA's long-standing interpretation of Section 212(c), finding it consistent with Congress' avowed purpose in enacting this provision: to narrow the class of aliens eligible for relief under a predeces-

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ings were commenced. The immigration judge held that Castillo-Felix was ineligible for relief under Section 212(c) because insufficient time had elapsed since his admission as an immigrant in 1972. The judge held, in the alternative, that he would deny relief to Castillo-Felix, in the exercise of his discretion, were he eligible. The BIA affirmed on the ineligibility ground, without passing on the alternative ground for the result.

The court of appeals agreed with the BIA on the question of statutory interpretation. The court noted, however, that, as in *Anwo*, "it is * * * unlikely that Castillo-Felix would be eligible for relief even if we adopted his interpretation of the statute." 601 F.2d at 463 n.7. The court thus apparently recognized that, as a result of the illegal character of his entry, Castillo-Felix (like the alien in *Lok*; see note 6, *supra*) could not establish a lawful domicile prior to his admission as a permanent resident.

sor enactment, the "Seventh Proviso" to Section 3 of the 1917 Immigration Act (Act of Feb. 5, 1917, ch. 29, Section 3, 39 Stat. 878).

b. The statutory construction in *Castillo-Felix*, adopted by the court below, is inconsistent with the analysis in *Lok*. Insofar as we are aware, however, the cases discussed above are the only ones in which the question presented for review by petitioner has arisen in the courts of appeals in the 29 years since the enactment of Section 212(c). As the Ninth Circuit noted in *Castillo-Felix* (601 F.2d at 465), the question presented does not affect any immigrants, *i.e.*, those admitted to this country for permanent residence, and can affect only a "small and rather exclusive group of nonimmigrants," *i.e.*, those who entered the United States lawfully without having to maintain a foreign residence. It accordingly appears that the issue lacks sufficient general importance to warrant review by this Court.

We think it significant, as well, that in the instant case, as in every other case discussing this question, a sound and independent alternative basis for the result is apparent. Here, the Board of Immigration Appeals has determined that petitioner is, in any event, undeserving of an exercise of discretion in his favor (Pet. Supp. App. 9a). While the court of appeals did not discuss this alternative ground for denying relief,[9] the discretion entrusted to the Attorney General and his delegates under Section 212(c) is broad and unqualified, and there is nothing in the record to show an abuse of that discretion here. See *INS* v. *Wang*, No. 80-485 (Mar. 2, 1981). To the contrary, the record shows petitioner's ac-

[9] This alternative ground was presented by the government in its brief filed in the court of appeals (Br. 22 n.13).

knowledged involvement in narcotics activity.[10] In these circumstances, it is most unlikely that petitioner could ultimately secure relief under Section 212(c), regardless of the resolution of the legal question concerning the correct interpretation of the statute. Hence, this case does not present an appropriate vehicle for further review. Cf. *INS* v. *Bagamasbad*, 429 U.S. 24, 26 (1976).

Each of the other cases interpreting Section 212 (c) cited by petitioner also contains an alternative ground for denying relief. In *Lok*, the alien was found upon remand to lack the necessary lawful domicile. See note 6, *supra*. In *Anwo*, the BIA and the court of appeals held that the alien was barred from lawfully harboring the necessary domiciliary intent during part of his residence (see page 7 & note 7, *supra*). In *Castillo-Felix*, the immigration judge indicated that he would deny relief in the exercise of his discretion, while the court of appeals recognized that the alien was probably unqualified for relief on other grounds (see note 8, *supra*). This pattern informs and substantiates our belief that the issue of statutory construction is of insufficient practical importance to warrant consideration by this Court.

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[10] In addition to the nature of petitioner's offense, which weighs heavily against discretionary relief in his case, we note that petitioner is apparently separated from his wife (Pet. App. 3a) and their daughter is being raised by her maternal grandparents in El Salvador (J.A. 66). Accordingly, the humanitarian policy of preserving family unity embodied in Section 212(c) has diminished force in the setting of this case. Compare *Lok* v. *INS*, *supra*, 548 F.2d at 41 & n.3.

2. In any event, the decision of the court of appeals is correct, for the reasons stated by the court below (Pet. App. 7a-11a) and by the Ninth Circuit in *Castillo-Felix* v. *INS*, *supra*, 601 F.2d at 462-467. If not compelled by the language of the statute or its legislative history (compare *id.* at 463-465 with *Lok* v. *INS*, *supra*, 548 F.2d at 40-41), the INS' interpretation is surely "neither inconsistent nor unjustified" (Pet. App. 11a) in light thereof.[11] In the absence of any conclusive indication of congressional intent, it is appropriate to defer to the agency's longstanding interpretation of Section 212(c). Such a "'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new,'" commands particular deference. *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). As the court of appeals observed (Pet. App. 10a), Congress' failure to disturb the BIA's practice by an amendment to

[11] The INS' interpretation of the statute "accords with well-established congressional goals" (*Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 251 (1978)), because the intent of Congress in enacting Section 212(c), as noted above (see pages 8-9, *supra*), was to limit the availability of discretionary relief from deportation. In framing the 1952 Act, Congress considered language that would have required the result reached by the INS (see S. Rep. No. 1515, 81st Cong., 2d Sess. 384 (1950)), but did not actually employ that language. As the Ninth Circuit noted in *Castillo-Felix* (601 F.2d at 465), the context of the cited Senate report makes it at least as likely that the language was omitted as superfluous as that its omission reflects a considered decision to reject the position advanced by the INS—which the Second Circuit had assumed in *Lok* (548 F.2d at 41).

the Act in the 28 years that have elapsed since the BIA announced its interpretation of Section 212(c) in *Matter of S., supra*, suggests that Congress approves of or has acquiesced in the administrative interpretation of the Act. *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Haig* v. *Agee*, No. 80-83 (June 29, 1981) slip op. 18-19; *CBS, Inc.* v. *FCC*, No. 80-207 (July 1, 1981), slip op. 12-15.[12]

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[12] Petitioner's contention (Pet. 17-21) that the court of appeals "ignore[d] the important ramifications of [the] decision" of this Court in *Elkins* v. *Moreno*, 435 U.S. 647 (1978), is unjustified. The decision below expressly adopts the analysis employed by the Ninth Circuit in *Castillo-Felix* (Pet. App. 8a-10a). There, the Ninth Circuit took note of *Elkins* (see 601 F.2d at 464), recognizing that *Elkins* left open the possibility that certain limited classes of nonimmigrant aliens could establish a United States domicile. In *Elkins*, this Court held that nothing in the Immigration and Nationality Act precludes a non-immigrant alien belonging to a class not barred from harboring domiciliary intent from acquiring a Maryland domicile for the purpose of establishing eligibility for reduced tuition at the state university. 435 U.S. at 663-666. As the Ninth Circuit evidently recognized, nothing in *Elkins* casts light upon the distinct question presented here. This case instead concerns the relationship between the two jurisdictional predicates of Section 212(c): the requirement of lawful admission for permanent residence and the requirement of seven years' lawful unrelinquished domicile. Accordingly, the possibility that petitioner might, after *Elkins*, be able to establish a United States domicile—a showing that has yet to be required of him in this case—is not relevant to the resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

PRAMAN CHIRAVACHARDHIKUL
a.k.a. PRAMAN CHIRAVACHARDHIJUL

PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE

RESPONDENT

REPLY PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY PETITION FOR WRIT

OF CERTIORARI

STATEMENT

The petition for a writ of certiorari was filed July 2, 1981. The brief for the respondent in opposition was filed by mail September 16, 1981.

POINT ONE: THE ALTERNATIVE GROUND

The respondent argues that Praman's case is inappropriate for review because the Board stated in dicta that even if Praman was eligible for discretionary relief under section 212(c), it would be denied because of his drug involvement. (Pet. supp. app. 8a- 9a).

Althouqh petitioner was able to submit several character reference affadavits, the record clearly shows that he was not given a reasonable opportunity to present evidence to convince the Trial Judge to grant the waiver.

Even the Respondent does not refute that there was no full and fair hearing afforded Petitioner that comported with accepted principles of due process.

The Tenth Circuit faced a remarkably similar situation in which it adjudged that an alien facing deportation because of his conviction for importation of narcotics was denied an adequate 212(c) hearing. Chief Judge Lewis writing for a unanimous Court stated:

> "The gratuitous statement of the immigration judge that he would deny the application in any event was therefore based on evidence relating soley to the issue of deportability, rather than to the separate and distinct issue of whether deportation should be waived in this particular case. Vissian's counsel did make an offer of proof consisting of eleven letters of recommendation from apparently substantial citizens stating the basis of their association with Vissian, their knowledge of his Australian conviction and their opinion as to his present moral character and value to the community. We cannot conclude, however, that this isolated offer of proof, which was summarily rejected in the immigration judge's decision, satisfied the requirements of a full and fair hearing comporting

with accepted principles of due process."

See Vissian v. INS, 548 F.2d 325 (10th Cir. 1977). See also Matter of Marin Int. Dec #2666 (B.I.A. 1978).

POINT TWO: THE FAMILY SITUATION

In footnote 10 of their brief, respondent erroneously assumes that Praman is currently separated from his wife and their child is being raised in El Salvador. This is in error. Though Praman and his wife separated after marital difficulties before the initial hearing, and remained in that status until after the hearing, they have reconciled and have been residing together with their child since 1979.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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